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No. 02-15

IN THE

Supreme Court of the United States

GREGORY P. SHELTON, *et al.*,
Petitioners,

v.

CONSUMER PRODUCT SAFETY COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR PETITIONERS

MATTHEW R. GUTWEIN *
APRIL E. SELLERS
BAKER & DANIELS
300 North Meridian Street, Suite 2700
Indianapolis, Indiana 46204-1782
(317) 237-0300

DAVID W. WHIPPLE
WHIPPLE LAW FIRM, P.C.
818 Grand Avenue
Kansas City, Missouri 64106
(816) 842-6411

ROBERT B. HOPKINS
CARLA N. BAILEY
OBER, KALER, GRIMES & SHRIVER
120 East Baltimore Street, Eighth Floor
Baltimore, Maryland 21202-1643
(410) 685-1120

* Counsel of Record

Counsel for Petitioners

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REPLY BRIEF FOR PETITIONERS

1. The government's brief in opposition is most notable for what it does not say. The government does not deny that the circuits are in deep conflict on whether a court should grant *Chevron* deference to an agency's interpretation of its own jurisdiction. The government does not dispute that this is an important and recurring issue of federal law that is ripe for the Court's review. Nor does the government make any serious effort to defend the analysis of those several circuits (such as the Eighth Circuit here) that accord an agency deference to its interpretation of its own jurisdiction. Instead, the government asserts that the Eighth Circuit "did not decide this case on the basis of *Chevron* deference to the administrative construction of an ambiguous statute." (Br. in Opp. 9.) The government is wrong.

The government rests its assertion on the Eighth Circuit's treatment of an entirely different issue from that raised in the petition. Shelton argued below that as a threshold matter the CPSC lacks jurisdiction to regulate products, such as common fireworks, that are used outside the household. The Eighth Circuit rejected Shelton's jurisdictional argument, reasoning that "16 C.F.R. § 1500.3(c)(10)(i), qualifying the language in the FHSA, precisely refutes this contention." (Pet. App. 13a n.4.) The court went on to quote the regulation and, notably, cited no language from the act. Thus, the Eighth Circuit deferred to the CPSC's regulations interpreting the agency's jurisdictional scope. Contrary to the government's assertion, the Eighth Circuit did not rest its decision on the plain language of the statute. With respect to the rejection of the jurisdictional argument, the Eighth Circuit made no pronouncement that the language of the statute was plain or that it dealt with the precise question at issue.

Shelton next presented an alternative argument. Shelton maintained that even if the CPSC had jurisdiction over common, outdoor fireworks under the FHSA, those fireworks are not a "hazardous substance," as defined by the act, because the fireworks are adequately labeled. The Eighth Circuit rejected that argument too, this time under the plain language of the FHSA. (Pet. App. 10a.) That is the portion of the Eighth Circuit's opinion the government cites. But the Eighth Circuit's reasoning on this discrete issue has nothing to do with the court's analysis of the CPSC's jurisdiction over outdoor fireworks. The government relies on the wrong portion of the Eighth Circuit's opinion.

Though the Eighth Circuit's jurisdictional analysis was breezy and relegated to a footnote, the court certainly did defer to the CPSC's view of its jurisdiction. If, as the government posits, the court below believed the act was unambiguous, the court would not have cited to the regulation. While mentioning the statute, the Eighth Circuit does not

point to any statutory language that would support its conclusion nor offer any statutory analysis whatsoever. The court employed none of the tools of statutory construction, and instead merely deferred to the agency's position. Indeed, the brevity of the Eighth Circuit's analysis is an example of the worst sort of *Chevron* deference.

Yet that form of knee-jerk deference to an agency's interpretation of its own jurisdiction is hardly unusual. *See Connecticut v. United States Dep't of Interior*, 228 F.3d 82, 93 (2d Cir. 2000), *cert. denied*, 532 U.S. 1007 (2001); *Wetlands Action Network v. United States Army Corps of Eng'rs*, 222 F.3d 1105, 1118 (9th Cir. 2000), *cert. denied*, 122 S. Ct. 41 (2001). For that reason, given the maturity of the conflict below, there is no reason for this Court to wait for a different vehicle to grant review. This issue is purely legal, so this Court's resolution of it does not require the court below to have engaged in an extensive factual or legal discussion. The Court's guidance is needed now, and this case is a perfectly suited vehicle for providing it.

Accordingly, this case squarely presents the important and recurring issue of whether a court should grant *Chevron* deference to an agency's interpretation of its own jurisdiction. The Court should grant review.

2. The government does not deny that the circuits are in conflict over the appropriate standard that a district court should use in ruling on a Rule 39(b) request for a jury trial. Some circuits, including the Eighth, require the moving party to justify its failure to timely demand a jury without regard to prejudice to the non-moving party. Other circuits hold that a district court should permit a jury trial unless compelling reasons exist not to do so, while still others follow more flexible guidelines. The government minimizes the importance of these distinctions, arguing that the differences are "relatively narrow." (Br. in Opp. 13.) But the standard largely dictates whether a court grants a jury trial request

under Rule 39(b). The right to a jury trial—which this Court historically has held inviolate—is too important to tolerate differing standards. In this case the government has never argued it would have been prejudiced by the grant of a jury trial. The government acknowledges that it did not move to strike the jury request until ten months after Shelton made the request and three weeks before trial. In denying the Shelton corporate parties' request, the Eighth Circuit never considered the lack of prejudice to the government nor the minimal amount of trial preparation the parties had engaged in when the Shelton corporate parties made their request. Consistent with other circuits, the court below placed the burden entirely on the Shelton corporate parties to persuade the district court they should be afforded a jury trial. This analysis directly conflicts with other circuits that hold a district court should grant relief under Rule 39(b) absent contrary compelling reasons.

The right to a jury trial is a fundamental right preserved by the Seventh Amendment. The circuit courts follow deeply divergent standards in applying the right. The Court should grant the review to resolve this important issue and require a district court exercise its discretion to grant relief from waiver absent a conflicting compelling reason.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MATTHEW R. GUTWEIN *
APRIL E. SELLERS
BAKER & DANIELS
300 North Meridian Street, Suite 2700
Indianapolis, Indiana 46204-1782
(317) 237-0300

DAVID W. WHIPPLE
WHIPPLE LAW FIRM, P.C.
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